Supreme Court, U.S.
FILED
OCT 7 2002
CLERK

No. 02-305

IN THE

Supreme Court of the United States

MIKE MOORE, Attorney General of the State of Mississippi and ERIC CLARK, Secretary of State of the State of Mississippi,

Petitioners,

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

MICHAEL B. WALLACE
PHELPS DUNBAR, L.L.P.
200 S. Lamar Street
Suite 500, Skytel Centre
Jackson, MS 39225

Counsel for Petitioner

Of Counsel

STEPHEN A. BOKAT
General Counsel
U.S. Chamber of Commerce
1615 H Street, N.W.
Washington, DC 20062

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

39 pp

QUESTIONS PRESENTED

1. Whether this Court's time-tested, objective, bright-line "express advocacy" standard that defines what political speech may be regulated by campaign finance laws should be replaced by a broad, subjective, and ambiguous standard that would put the political speaker at the mercy of the varied understandings of hearers.

2. Whether any new constitutional standard, were one to be adopted, would change the construction of Mississippi's campaign finance statute, which explicitly adopts the "express advocacy" standard.

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America was incorporated in the District of Columbia in 1916. It is a non-profit, non-stock corporation, exempt from taxation under I.R.C. § 501(c)(6).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
COUNTERSTATEMENT OF THE CASE	1
Legal Overview	1
Background and Trial Court Proceedings	2
The Fifth Circuit Decision	4
REASONS FOR DENYING THE WRIT	6
SUMMARY OF ARGUMENT	6
I. THE FIFTH CIRCUIT CORRECTLY READ *BUCKLEY* AND *MCFL* TO REQUIRE EXPLICIT WORDS OF EXPRESS ADVOCACY	10
II. EVERY FEDERAL COURT OF APPEALS TO CONSTRUE BOTH *BUCKLEY* AND *MCFL* HAS REACHED THE SAME CONCLUSION AS THE FIFTH CIRCUIT DID HERE	13
III. THE STATE COURTS DO NOT REQUIRE CORRECTION	18
IV. EVEN IF THE COURT WERE INCLINED TO ADOPT A NEW STANDARD, THIS CASE PRESENTS A POOR VEHICLE FOR SUCH AN UNDERTAKING	22
A. These Petitioners offer a hopelessly broad, subjective and ambiguous alternative standard	22

TABLE OF CONTENTS—Continued

Page

B. A new constitutional standard adopted by this Court would not alter Mississippi's statute, which embodies the *Buckley* express advocacy standard 25

V. THIS CASE WOULD NOT BE A USEFUL COMPANION TO NEXT YEAR'S DIRECT APPEAL OF CONSTITUTIONAL CHALLENGES TO THE NEW FEDERAL CAMPAIGN FINANCE LEGISLATION 26

A. This case cannot be consolidated with the *McConnell* case in a manner consistent with this Court's practice 28

B. Judicial economy is not furthered by considering this case with the *McConnell* case 28

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Bartlett v. Perry, 532 U.S. 905 (2001) 9
Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*
Chamber of Commerce v. Landrum, No. 2000-CA-02048-SCT (Miss. Feb. 7, 2002), *petition for cert. filed*, 5/20/2002 U.S.L.W.D. d10 (U.S. May 8, 2002) (No. 01-1649) 9
Chamber of Commerce v. Vollor, 532 U.S. 1058 (2001) 9
Citizens for Responsible Government State PAC v. Davidson, 236 F.3d 1174 (10th Cir. 2000) 2, 11
Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991) 2, 11
FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2d Cir. 1980) 2, 11, 18
FEC v. Christian Action Network, Inc., 110 F.3d 1049 (4th Cir. 1997) 2, 11, 17
FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987) .... *passim*
FEC v. Keefer, 502 U.S. 820 (1991) 9
FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ..... *passim*
FEC v. Massachusetts Citizens for Life, Inc., 589 F. Supp. 646 (D. Mass. 1984) 14
FEC v. Massachusetts Citizens for Life, Inc., 769 F.2d 13 (1st Cir. 1985) 14
FEC v. Maine Right to Life Committee, Inc., 522 U.S. 810 (1997) 9
FEC v. National Organization for Women, 713 F. Supp. 428 (D.D.C. 1989) 18
Florida Right to Life, Inc. v. Lamar, 238 F.3d 1288 (11th Cir. 2001) 2, 11
Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994) 28

TABLE OF AUTHORITIES—Continued

Page

Iowa Right to Life Committee, Inc. v. Williams, 187 F.3d 963 (8th Cir. 1999) 2, 11
Maine Right to Life Committee, Inc. v. FEC, 914 F. Supp. 8 (D. Me. 1996) 17
Maine Right to Life Committee, Inc. v. FEC, 98 F.3d 1 (1st Cir. 1996) 2, 11, 17
McConnell v. FEC, No. 02-582 (D.D.C. filed Mar. 27, 2002) ..... *passim*
North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999) 2, 11
North Carolina Right to Life, Inc. v. Bartlett, 528 U.S. 1153 (2000) 9
National Federation of Republican Assemblies v. United States, No. CIV.A.00-0759-RV-C, 2002 WL 2008245 (S.D. Ala. Aug. 27, 2002) ... 18
Perry v. Bartlett, 231 F.3d 155 (4th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001) 2, 11
United States v. Eichman, 496 U.S. 310 (1990) 28
Virginia Society for Human Life, Inc. v. FEC, 263 F.3d 379 (4th Cir. 2001) 2, 10, 17
Virginia Society for Human Life, Inc. v. Caldwell, 152 F.3d 268 (4th Cir. 1998) 2, 11
Vermont Right to Life Committee, Inc. v. Sorrell, 19 F. Supp. 2d 204 (D. Vt. 1998) 11
Vermont Right to Life Committee, Inc. v. Sorrell, 221 F.3d 376 (2d Cir. 2000) 2, 11

STATE CASES

Brownsburg Area Patrons Affecting Change v. Baldwin, 714 N.E.2d 135 (Ind. 1999) 19
Connecticut v. Proto, 526 A.2d 1297 (Conn. 1987) 19
Doe v. Mortham, 708 So.2d 929 (Fla. 1998) 19

TABLE OF AUTHORITIES—Continued

Page

Elections Board of Wisconsin v. Wisconsin Manufacturers & Commerce, 597 N.W.2d 721 (Wisc. 1999) 20

Governor Gray Davis Committee v. American Taxpayers Alliance, No. A096658, 2002 WL 31116829 (Cal. App. 1 Dist. Sept. 25, 2002) 19, 20

Osterberg v. Peca, 12 S.W.3d 31 (Tex. 2000), *cert. denied*, 530 U.S. 1244 (2000) 20, 21

State ex rel. Crumpton v. Keisling, 982 P.2d 3 (Or. Ct. App. 1999) 21

Virginia Society For Human Life, Inc. v. Caldwell, 500 S.E.2d 814 (Va. 1998) 19

Washington State Republican Party v. Washington State Public Disclosure Commission, 4 P.3d 808 (Wash. 2000) 19

FEDERAL STATUTES

2 U.S.C. § 431(17) 28

2 U.S.C. § 434 27

2 U.S.C. § 437h 8

Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 83 (2002) ..... *passim*

I.R.C. § 501(c)(6) ii

STATE STATUTES

1986 Miss. Laws 495 ..... 3, 26

Or. Rev. Stat. § 260.044(1) 21

FEDERAL REGULATIONS

11 C.F.R. § 109.1(d)(1) 23

OTHER AUTHORITIES

Anthony Corrado, *On the Issue of Issue Advocacy: A Comment*, 85 Va. L. Rev. 1803 (1999) 25

TABLE OF AUTHORITIES—Continued

Page

Bipartisan Campaign Reform Act of 2002, Election Law News (Wiley Rein & Fielding LLP, Washington, D.C.) Mar. 27, 2002 27

Glenn J. Moramarco, *Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering*, 49 Cath. U. L. Rev. 107 (1999) 25

Richard E. Levy, *Defining Express Advocacy for Purposes of Campaign Finance Reporting and Disclosure Laws*, 8 Kan. J.L. & Pub. Pol'y 90 (1999) 25

Scott E. Thomas & Jeffrey H. Bowman, *Is Soft Money Here to Stay Under the "Magic Words" Doctrine?*, 10 Stan. L. & Pol'y Rev. 33, 35 (1998) 25

COUNTERSTATEMENT OF THE CASE

Legal Overview

In 1976 this Court held that the First Amendment limits campaign finance laws to regulating independent expenditures for speech that contains "explicit words" to "expressly advocate" the election or defeat of clearly identified candidates. *Buckley v. Valeo*, 424 U.S. 1, 43-44, 80 (1976). Examples of "express words of advocacy of election or defeat" include "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject." *Id.* at 44 n.52.

The Court grounded its holding on both the need for precision and certainty of regulation and the imperative of preventing overbroad regulation of political speech. *Id.* at 41-44, 79-80. The Court made no pretense that the "express advocacy" standard would reach all speech that was intended to influence elections. To the contrary, it held that speech subjectively intended to influence elections must be protected unless explicit words of express advocacy are employed. "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, *they are free to spend as much as they want to promote the candidate and his views.*" *Id.* at 45 (emphasis added).

A decade later, this Court specifically reaffirmed the requirement of "explicit" words of "express" advocacy. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("*MCFL*"). The Court distinguished between the requirement that advocacy be "explicit" and "express" and the element of directness. *Id.* at 249. It held that a communication stating "vote pro-life" followed by a list of clearly identified candidates who were described as "pro-life" was "marginally less direct" than the *Buckley* examples, but did not defeat the "essential nature" of explicit and express advocacy. *Id.* at 243, 249.

Every federal court of appeals to discuss the holdings of both *Buckley* and *MCFL* has held that they mean just what they say, requiring "explicit" words of "express" advocacy.[1] The Fifth Circuit here joined that unanimous view.

Background and Trial Court Proceedings

The November 7, 2000, Mississippi elections included races for four seats on the state Supreme Court. Respondent Chamber of Commerce of the United States ("Chamber"), a non-profit organization that represents business interests in dealing with all branches and phases of government, produced four television advertisements that aired during the three weeks before the election. These four advertisements separately addressed issues and the background and philosophy of each candidate, but did not mention an election or contain any explicit words advocating electoral action.

Shortly after the Chamber began running its ads, Mississippi Secretary of State Eric Clark wrote to Mississippi Attorney General Michael Moore asking him to take action against the Chamber's ads under Mississippi's election statutes. Faced with perceived civil and criminal exposure, and seeking to clarify its legal obligations, the Chamber brought a declaratory judgment action in the United States

---

[1] *See Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *Me. Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996). *See also Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *Va. Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268 (4th Cir. 1998); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997); *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991); *see also FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980; *Fla. Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (affirming preliminary injunction).

District Court for the Southern District of Mississippi, naming Petitioners, Attorney General Moore and Secretary of State Clark, as defendants. It sought a declaration that the Chamber's ads did not include "express advocacy" and, hence, were not subject to Mississippi election statutes. Petitioners argued in response that Mississippi election law applied, because the Chamber's ads "expressly advocate the election of the favored candidates for the four Mississippi Supreme Court seats" (Pet. App. at 21a), and thus were "'independent expenditures' subject to the reporting requirements" of Mississippi law (Pet. App. at 23a).

The "express advocacy" test had been written into Mississippi law in early 1986.[2] Since it was adopted before *MCFL* was decided, the presumed intent was to incorporate the *Buckley* standard. All parties recognized that this statute was intended to adopt the *Buckley* holding. (Pet. at 10-11).

On November 2, 2000, the district court issued a Memorandum Opinion and Order in the Chamber's declaratory judgment action. The opinion explained that the Chamber's ads were independent speech, there being "no proof whatsoever of any collaboration between the Chamber and the candidates involved in the advertisements" (Pet. App. at 21a). The district court also did not find any explicit language advocating electoral action. The court's descriptions of the ads appear in the Petition Appendix at 25a-27a. Nevertheless, the district court concluded that the Chamber advertisements "offer thinly veiled exhortations to support the campaigns of the aforesaid candidates, a plain, clever attempt to avoid the reach of Mississippi reporting and disclosure laws by eliminating those words listed at footnote 52 of *Buckley*." (Pet. App. at 44a).

The district court recognized that every federal court of appeals to construe both *Buckley* and *MCFL* had read them to

---

[2] 1986 Miss. Laws 495 (enacted Apr. 16, 1986).

mean what they said—only "explicit" language of "express advocacy" may be regulated. However, the district court concluded that, when *MCFL* held that the use of two statements that combined to explicitly advocate a vote did not alter the "essential nature" of the express advocacy, the Court had adopted a new "essential nature" standard under which implied messages could be deemed express. (Pet. App. at 42a). Ironically, the court bolstered this conclusion by reference to a Ninth Circuit opinion that had overlooked *MCFL* entirely in construing *Buckley*. *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). (Pet. App. at 34a-36a, 42a). Using that analytic framework, the district court concluded that the ads "expressly advocate" the election of the named candidates, and, consequently, that the Chamber was subject to Mississippi's campaign finance laws. (Pet. App. at 44a). The Chamber appealed the district court decision to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit Decision

The court of appeals unanimously reversed the district court. It rejected the lower court's claim that this Court's *MCFL* opinion altered *Buckley*'s express advocacy standard. It also held that the district court's attempt to base a standard on *Furgatch*—an opinion that had overlooked *MCFL*—was inconsistent with this Court's decisions in *Buckley* and *MCFL*, as well as subsequent courts of appeals decisions, which it deemed to provide "a well worn path" requiring "words that *explicitly* advocate the election or defeat of a particular candidate." (Pet. App. at 4a). It held that the district court's approach violated *Buckley*'s express holding and defeated "*Buckley*'s emphasis on (1) the need for a bright-line rule demarcating the government's authority to regulate speech and (2) the need to ensure that regulation does not impinge on protected issue advocacy." (Pet. App. at 7a).

The district court's standard was found to introduce "two elements not present in the limited inquiry endorsed by the

other circuits: (1) 'limited reference' to the context of the communication and (2) reference to whether 'reasonable minds' could differ about the meaning of the communication." (Pet. App. at 9a). Agreeing with other circuits, the Fifth Circuit held that "the *Furgatch* test is too vague and reaches too broad an array of speech to be consistent with the First Amendment." (Pet. App. at 10a). The district court test violated *Buckley*'s mandate that the speaker not be left "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent or meaning." 424 U.S. at 43. The Fifth Circuit understood that, to "avoid this result, the [Supreme] Court emphasized the need for a clear line between regulated and unregulated speech." (Pet. App. at 11a). Accordingly, the Fifth Circuit held that *Buckley* means just what it says; a "communication constitutes 'express advocacy'—and may therefore be subject to mandatory disclosure regulations—only if it contains explicit words advocating the election or defeat of a clearly identified candidate." (Pet. App. at 12a).

The court of appeals then held that the Chamber advertisements at issue "do not constitute 'express advocacy' under the bright line approach adopted above," because the "Chamber's advertisements do not contain explicit words exhorting viewers to take specific electoral action for or against the featured candidates." (Pet. App. at 17a). The court of appeals rejected Petitioners' arguments that a number of ad attributes or contextual factors could appropriately be substituted for the undisputed absence of any explicit words exhorting viewers to take specific electoral action. Those proposed substitutes included the fact that the Chamber's advertisements contained "references to positive attributes of specific candidates" (Pet. App. at 13a), were "aired on the eve of the elections" (Pet. App. at 14a), or were "virtually identical to the candidates' own advertisements—except they omit the phrase 'vote for [the featured candidate]" (Pet. App.

at 14a).[3] The court of appeals rejected such contentions on the grounds that "communications that discuss in glowing terms the record and philosophy of specific candidates" do not constitute express advocacy "unless they also contain words that exhort viewers to take specific electoral action for or against the candidates" (Pet. App. at 14a), and "contextual factors" such as date of broadcast or similarity to other ads "are irrelevant to our determination whether the advertisements contain express advocacy" (Pet. App. at 15a).

Accordingly, the court of appeals held that "the First Amendment protects the Chamber's advertisements, and consequently the advertisements are not subject to regulation under the Mississippi election statute." (Pet. App. at 17a-18a). It reversed the judgment of the district court and remanded for entry of judgment in the Chamber's favor. (Pet. App. at 18a). Petitioners' subsequent request for rehearing en banc was denied. (Pet. App. at 47a).

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

There is no reason for this Court to grant review.

1. There is no split among the circuits. To the contrary, every court of appeals to construe both the *Buckley* and

---

[3] This latter assertion—that the Chamber's ads were "virtually identical" to the candidates' ads—simply is not accurate. The district court made the assertion, but did not explain the contents of the candidates' ads. The Petitioners have similarly failed to do so in their submission to this Court. The ads are not "virtually identical," which is a subjective standard to begin with. If it mattered legally, and it does not, the Chamber urges the Court to compare the Chamber ads proffered by the Petition (at 6, 52a, 53a, 54a) with the candidate ads that were made part of the record below (Oct. 30, 2000, Hr'g Tr. at 24 (candidate ads received by the district court and marked as D-1 for identification)). Moreover, the Chamber's ads were not coordinated with any candidate or party. (Pet. App. at 21a).

MCFL decisions has reached the same conclusion—that when this Court specified explicit words of express advocacy, it meant just that. The differing Ninth Circuit opinion, *Furgatch*, overlooked the then just-decided *MCFL* opinion. *Furgatch* was out-of-date when it issued. It has not been followed by any of the other circuits or, for that matter, by any subsequent Ninth Circuit opinion.

2. There is no tension between the Fifth Circuit decision and this Court's *MCFL* ruling. To the contrary, the Fifth Circuit carefully followed the precise holdings of *MCFL*. The district court's belief that *MCFL* adopted a newer and broader "essential nature" test was mistaken. *MCFL* held that putting explicit words of advocacy into two phrases, rather than one, makes them "marginally less direct" but does not change their "essential nature" as explicit and express advocacy. It did not adopt a new "essential nature" test. No circuit ever has read *MCFL* to accept something less than explicit and express advocacy.

3. State courts do not require further guidance. No state supreme court actually has rejected the standard reading of *Buckley* and followed *Furgatch*. Many state courts have followed the standard reading of *Buckley*. Moreover, with increasing numbers of strong and consistent opinions from more circuits, there is no reason to believe that future state courts will reject the view that this Court meant what it said in *Buckley* and *MCFL*. Just days ago, a California court correctly adopted the same standard as the Fifth Circuit here.

4. There is no reason for this Court to reconsider the requirement of explicit words of express advocacy that it formulated in *Buckley,* and reaffirmed in *MCFL*, which has been carefully followed by the federal and state courts. Nor, if the Court were inclined to reconsider, would this case be the proper vehicle. The Petitioners here offer only a broad, subjective and ambiguous alternative standard that flies squarely in the face of *Buckley*'s objective of not holding

political speakers at the mercy of their viewers' interpretations. Petitioners offer no meaningful justification for such a dramatic change in First Amendment philosophy. Additionally, Petitioners fail to recognize that their own authority is limited by the *Buckley* language in the Mississippi statute. Relaxing the constitutional standard would not change the Mississippi legislative standard now in place.

5. The Fifth Circuit opinion does not provide a useful "companion" to the constitutional challenge to the recently enacted Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 83 (2002) ("BCRA"). As the Petition observes, that challenge will arrive at this Court by direct appeal some time next year. *See McConnell v. FEC*, No. 02-582 (D.D.C. filed Mar. 27, 2002) (complaint filed in consolidated challenge before three-judge panel).[4] In the BCRA, Congress has attempted to craft a legislative alternative to the express advocacy standard of *Buckley* and *MCFL*. In reviewing Congress' handiwork, this Court can give whatever additional First Amendment guidance it deems appropriate.

This case does not meet this Court's standards for consolidated cases and would only add burden to what already will be a large and complex proceeding. Petitioners' notion that this case will be needed in reviewing *McConnell* to provide a few tangible examples of actual advertisements is unsupportable. The parties in the BCRA challenge are compiling a record that will contain thousands of such ads, including dozens of television and radio ads by the Chamber.[5] Thus,

---

[4] Title IV § 403 of the BCRA (to be codified at 2 U.S.C. § 437h) provides for direct appeal to this Court.

[5] Counsel of Record submitting this Opposition is counsel for the Chamber and several other plaintiffs, including Senator Mitch McConnell in the BCRA challenge. During discovery in that case, hundreds of taped "issue" ads have been produced, plus story boards and scripts for thousands of ads, some containing express advocacy and some not. Many of these ads already have been designated as trial exhibits. The Chamber

the Court will have an ample selection of concrete ads to discuss without this case.

For these reasons, the Petition should be denied.[6]

---

has designated and intends to offer many of its ads. The three-judge court has issued a scheduling order, *McConnell v. FEC*, No. 02-582 (D.D.C. filed July 26, 2002), setting December 4, 2002, as the date for final arguments.

[6] Although the Chamber previously petitioned this Court for a writ of certiorari regarding express advocacy, *Chamber of Commerce v. Vollor*, 532 U.S. 1058 (2001), the justification for doing so has since been obviated by the issuance of the Fifth Circuit's decision in this case. In that petition, the Chamber sought review of the express advocacy standard in light of the district court's decision, which was the basis upon which state courts in Mississippi were granting ex parte prior restraints on the Chamber's political speech. However, the lower court's decision has since been overturned by the Fifth Circuit. The result has been a return to the status quo standard of express advocacy, as understood by *Buckley* and *MCFL*, which this Court has previously indicated does not warrant review. *E.g. Bartlett v. Perry*, 532 U.S. 905 (2001); *N.C. Right to Life, Inc. v. Bartlett*, 528 U.S. 1153 (2000); *FEC v. Me. Right to Life Comm., Inc.*, 522 U.S. 810 (1997); *FEC v. Keefer*, 502 U.S. 820 (1991).

On May 8, 2002, the Chamber filed a petition for certiorari in *Chamber of Commerce v. Landrum* that arose from the same Chamber advertisements. *Chamber of Commerce v. Landrum*, No. 2000-CA-02048-SCT (Miss. Feb. 7, 2002), *petition for cert. filed*, 5/20/2002 U.S.L.W.D. d10 (U.S. May 8, 2002) (No. 01-1649). However, that petition raised two independent and much different issues: (1) whether a state court's summary order against future political speech violates the First and Fourteenth Amendments, and (2) whether the state court's ruling penalizing the Chamber's exercise of its federal right to petition this Court by curtailing the Chamber's state appellate rights violated the Supremacy Clause of, and the Fourteenth Amendment to, the Constitution. Regardless of whether the *Buckley* express advocacy standard or some other standard limits the outer reach of election laws, the foregoing two issues raised by the Chamber's petition in *Landrum* would remain unaffected and would merit review by this Court.

I. THE FIFTH CIRCUIT CORRECTLY READ *BUCKLEY* AND *MCFL* TO REQUIRE EXPLICIT WORDS OF EXPRESS ADVOCACY.

The decision below correctly followed *Buckley*'s clear holding that, in order to ameliorate vagueness and overbreadth concerns, express advocacy must be limited to "communications that include explicit words of advocacy of election or defeat of a candidate." 424 U.S. at 43. To suggest otherwise, the Petition emphasizes that the court of appeals decision is "narrow" (Pet. at 5, 8, 9, 10, 19), by repeating that word several times.[7] Petitioners thus imply that the Fifth Circuit's decision is somehow more narrow than those of the many other courts of appeals that have followed the bright-line rule of *Buckley* and *MCFL* that prevents regulation of a political advertisement unless it contains "explicit" and "express words of advocacy of election or defeat such as 'vote for,' 'elect,'" and the like. *Buckley*, 424 U.S. 1, 43-44 & n.52 (1976).[8] In fact, the standard adopted by the Fifth Circuit is entirely consistent with the interpretations made by the other courts of appeals,[9] with the exception of the broad language in *Furgatch*.

---

[7] The Petition also repeatedly denigrates the Fifth Circuit's decision by characterizing it as adopting a "narrow 'magic words' approach" (Pet. at 3, 9, 10, 17, 18, 21) or "analysis by computer word search" (Pet. at 18-19, 20). Those are not the descriptions of the express advocacy test used by either the Chamber or the Fifth Circuit.

[8] *Buckley*'s footnote 52 explained that explicit words of advocacy include words like "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." *Id.* at 44 n.52. Because the Chamber's advertisements did not contain any of these words, or any other similarly explicit words of election advocacy, the Fifth Circuit correctly determined that the advertisements were not express advocacy. (Pet. App. at 13a).

[9] *See Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001) ("We are bound by *Buckley* and *MCFL*, which strictly limit the meaning of 'express advocacy'" "to clear words . . . 'such as 'vote

The Fifth Circuit rejected the district court's claim that this Court's *MCFL* opinion altered *Buckley*'s express advocacy standard. It also held that the district court's attempt to base a standard on *Furgatch*—an opinion that overlooked *MCFL*—was inconsistent with this Court's decisions in *Buckley* and *MCFL*, as well as subsequent courts of appeals decisions, which provide "a well worn path" requiring "words that *explicitly* advocate the election or defeat of a particular candidate." (Pet. App. at 4a). It held that the district court's approach violated *Buckley*'s express language and defeated "*Buckley*'s emphasis on (1) the need for a bright-line rule demarcating the government's authority to regulate speech

---

for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" (quoting *Buckley*, 424 U.S. at n.52)); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000) (According to *Buckley* and *MCFL*, "communications that do not contain express words advocating the election or defeat of a particular candidate are deemed issue advocacy, which the First Amendment shields from regulation."); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 388 (2d Cir. 2000) ("The regulation of 'communications that impliedly advocate for or against a candidate' would run afoul of the *Buckley* test." (quoting the lower court opinion at 19 F. Supp. 2d 204, 214 (D. Vt. 1998))); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999) ("The Supreme Court has made clear that a 'finding of 'express advocacy' depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc.'" (quoting *Buckley*, 424 U.S. at n.52)); *Faucher v. FEC*, 928 F.2d 468, 470 (1st Cir. 1991) ("Express advocacy is language which 'in express terms advocate[s] the election or defeat of a clearly identified candidate' through the use of such phrases as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' and 'reject.'" (quoting *Buckley*, 424 U.S. at 44 & n.52)). *See also Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *Va. Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268 (4th Cir. 1998); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997); *Me. Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980); *see also Fla. Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (affirming preliminary injunction).

and (2) the need to ensure that regulation does not impinge on protected issue advocacy." (Pet. App. at 7a).

The district court's standard was found to introduce "two elements not present in the limited inquiry endorsed by the other circuits: (1) 'limited reference' to the context of the communication and (2) reference to whether 'reasonable minds' could differ about the meaning of the communication." (Pet. App. at 9a). Agreeing with other circuits, the Fifth Circuit held that "the *Furgatch* test is too vague and reaches too broad an array of speech to be consistent with the First Amendment." (Pet. App. at 10a). That test violates *Buckley*'s mandate that the speaker not be left "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent or meaning." 424 U.S. at 43. The Fifth Circuit understood that, to "avoid this result, the [Supreme] Court emphasized the need for a clear line between regulated and unregulated speech." (Pet. App. at 11a). Accordingly, the Fifth Circuit held that *Buckley* means just what it says; a "communication constitutes 'express advocacy'—and may therefore be subject to mandatory disclosure regulations—only if it contains explicit words advocating the election or defeat of a clearly identified candidate." (Pet. App. at 12a). Thus, the Fifth Circuit correctly interpreted *Buckley*.[10]

---

[10] Fourteen states and the Commonwealth of Puerto Rico, *amici curiae* below, proposed a test for express advocacy that would allow regulation of political speech that contains an "express endorsement" and does not discuss "any issue as a topic worthy of its own attention." The Fifth Circuit rejected this proposal because it involves an impermissible inquiry into what issues are "worthy" of discussion. (Pet. App. at 10a). Furthermore, neither *Buckley* nor *MCFL* adopted a test that would regulate speech that does not include "express terms" of advocacy. (Pet. App. at 10a). For five of the fourteen states, this was a second attempt at broadening the express advocacy standard beyond the bounds set by this Court. Colorado, Florida, Iowa, North Carolina, and Vermont have all recently had campaign finance laws invalidated under the *Buckley*

II. EVERY FEDERAL COURT OF APPEALS TO CONSTRUE BOTH *BUCKLEY* AND *MCFL* HAS REACHED THE SAME CONCLUSION AS THE FIFTH CIRCUIT DID HERE.

The Petition asserts that the decision below is part of an "express split between the Circuits and disagreement among lower federal courts and state courts." (Pet. at 19-21). Only by misconstruing this Court's decisions in *Buckley* and *MCFL*, and by mischaracterizing selected lower federal and state court decisions, can the Petition arrive at such a result. The clear directives of this Court have been followed by every other circuit that has addressed both *Buckley* and *MCFL*. The Petition's argument that there is conflict among the circuits, as well as disagreement among other lower federal courts and state judiciaries, is unfounded, and certiorari cannot be justified on that theory.

This Court affirmed *Buckley*'s express advocacy standard in *MCFL*. 479 U.S. at 248-250.[11] No federal court of appeals has ever read *MCFL* to weaken or otherwise modify *Buckley*'s express advocacy test.[12] However, the Ninth Circuit's

---

standard by United States courts of appeals. *See Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Fla. Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000).

[11] *MCFL* examined a leaflet that contained the statement "vote pro-life" followed by a statement naming "pro-life" candidates. The Court cited *Buckley*'s express advocacy standard and its footnote 52 to conclude that the language in the leaflet entailed express advocacy of the named candidates. *MCFL* explained that a statement may be "explicit" and "express" without being entirely "direct." Using two statements instead of one made the advocacy "marginally less direct," but did not change its "essential nature" or its "effect" as explicit and express advocacy.

[12] *See supra* note 9. The district court's determination that the "essential nature" phrase in *MCFL* established a new standard is erroneous.

Furgatch opinion caused some confusion. *Furgatch* overlooked the then just-decided *MCFL* opinion and declared that express advocacy need not include explicit words of advocacy, but could be based on a broader examination of political speech to regulate implied advocacy. *Furgatch*, 807 F.2d at 863-64. *MCFL* was issued in mid-December, 1986. *Furgatch* was released in early January, 1987. *Furgatch*—which may well have been finalized and approved before *MCFL* was issued—cites only the First Circuit's *MCFL* opinion and does not even mention, much less discuss, this Court's ruling.

The potential significance of this oversight may be illustrated through consideration of the *MCFL* opinions. The district court in *MCFL* noted that the "FEC has not contended that the publication constituted express advocacy for any of the candidates," and, without substantial analysis, that district court later found that the "election editions were accurate tabulations of all candidates' positions on three public issues espoused by MCFL, without express advocacy of the election of a particular candidate." *FEC v. Mass. Citizens for Life, Inc.*, 589 F. Supp. 646, 648, 651 (D. Mass. 1984).

The First Circuit disagreed and held that the publication did fit within *Buckley*'s definition of express advocacy. *FEC v. Mass. Citizens for Life, Inc.*, 769 F.2d 13, 20 (1st Cir. 1985).[13]

> The *MCFL* Special Election Edition, however, explicitly advocated the election of particular candidates in the

---

When the *MCFL* opinion used that language, it was applying the *Buckley* standard, not purporting to adopt a new standard.

[13] In the First Circuit, as in the Supreme Court, the ultimate conclusion was that the statute could not regulate MCFL's publication consistent with the First Amendment. So the findings on express advocacy were not equivalent to findings that the publication could be regulated under the election statutes.

> primary elections and presented photographs of those candidates only. It reminded the reader that "your vote in the primary will make the critical difference in electing pro-life candidates."[5] Thus, the Special Election Edition expressly advocated the election of clearly identified candidates within the meaning of *Buckley*. *Id.*

[5] The disclaimer stating that "this special election edition does not represent an endorsement of any particular candidate" does not negate the expressions of advocacy in the publication.

Id. This analysis did not identify any specific language in the publication that "explicitly advocated the election of particular candidates." Therefore, the *Furgatch* court of appeals could fairly have understood the First Circuit to have based its conclusion on a perception of the publication as a whole. *Furgatch*'s description of the First Circuit decision is consistent with that reading.[14]

The Supreme Court's *MCFL* opinion, however, made clear that the express advocacy analysis must rely on what is expressly said, rather than the perception of readers. The key paragraph in *MCFL* reads as follows:

> *Buckley* adopted the "express advocacy" requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons.

[14] Thus, the Ninth Circuit's opinion stated, 807 F.2d at 861:

> In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* 769 F.2d 13 (1st Cir. 1985), the First Circuit considered an advertisement in which an anti-abortion group published a "Special Election Edition" of its newsletter which contained photographs of candidates identified as "pro-life." The publication included at least two exhortations to "vote pro-life" and the statement: "Your vote in the primary will make the critical difference in electing pro-life candidates." The court ruled that the "Special Election Edition ... explicitly advocated the election of particular candidates in the primary elections and presented photographs of those candidates only," and thus fell within the FEC's regulatory sphere.

> We therefore concluded in that case that *a finding of "express advocacy" depended upon the use of language* such as "vote for," "elect," "support," etc., *Buckley, supra*, at 44, n. 52, 96 S.Ct., at 646, n. 52. Just such an exhortation appears in the "Special Edition." *The publication not only urges voters to vote for "pro-life" candidates, but also identifies and provides photographs of specific candidates fitting that description.* The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The Edition goes beyond issue discussion to express electoral advocacy. The disclaimer of endorsement cannot negate this fact. The "Special Edition" thus falls squarely within § 441b, for it represents express advocacy of the election of particular candidates distributed to members of the general public.

479 U.S. at 249-250 (emphasis added). Thus, the Court made explicit that, under the *Buckley* standard, "a finding of express advocacy depended on the use of language" by the speaker such as "vote for," etc. It then stated the language that the MCFL publication contained that constituted express advocacy (*i.e.*, "vote for 'pro-life' candidates" plus "identifies and provides photographs of specific candidates"). It then approved reliance on speaker language in several different places to construct the express advocacy, even though that sort of representation by the speaker is "marginally less direct" than "Vote for Smith." Thus, the *MCFL* decision underscored that the proper analysis focuses on what the speaker says explicitly. By being more explicit and more precise than the First Circuit had been, this Court reaffirmed the need to identify the words that the speaker uses to determine "express advocacy." *MCFL* undercuts any potential inference from the First Circuit opinion that a court may appropriately draw a

conclusion of express advocacy in the absence of an identifiable speaker's words sufficient in and of themselves to constitute such advocacy.

Had the Ninth Circuit in *Furgatch* considered the Supreme Court's *MCFL* decision, it likely would have felt constrained from adopting a standard that relied on the court's "reasonable interpretation" made with "limited reference to external events." 807 F.2d at 864. Certainly, the subsequent courts of appeals decisions that did consider both *Buckley* and *MCFL* all deemed those decisions to preclude the *Furgatch* standard. However, *Furgatch* did not consider the Court's *MCFL* ruling, and hence, lacked the benefit of *MCFL's* explicit reaffirmation of *Buckley's* demand for express advocacy.

Because *Furgatch* overlooked *MCFL*, it was out-of-date before it was issued. Thus, when the losing party in *Furgatch* sought certiorari, the FEC in opposition to certiorari argued that Supreme Court review would serve no useful purpose since *MCFL* had just "discussed the proper application of the express advocacy standard" and *Furgatch* would be limited to its "particular facts." *See FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1054 (4th Cir. 1997) (quoting FEC Opposition to Certiorari in *Furgatch* at 7). The FEC's opposition to certiorari proved prophetic.[15] As noted *supra*, every subsequent United States court of appeals to address the

---

[15] The influence of *Furgatch* has been limited further by its subsequent history. The FEC amended its regulations to adopt the *Furgatch* standard for express advocacy. Those regulations were challenged and invalidated in *Maine Right to Life Committee, Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996). That court of appeals adopted the district court's opinion in *Maine Right to Life Committee, Inc. v. FEC*, 914 F. Supp. 8, 13 (D. Me. 1996), holding that the FEC's *Furgatch*-based regulation exceeded its statutory authority, as interpreted by *MCFL*, "because it extends beyond express advocacy." Furthermore, the same FEC regulations were recently challenged and again invalidated by the Court of Appeals for the Fourth Circuit in *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001).

issue—the First, Second, Fourth, Eighth, Tenth, and now, the Fifth Circuit—has given no weight to *Furgatch* and has read *MCFL* and *Buckley* to require explicit words of express advocacy.

The only other federal court case cited by the Petition (at 21) as an example of the supposed conflict over the meaning of express advocacy is the district court decision in *FEC v. National Organization for Women*, 713 F. Supp. 428 (D.D.C. 1989) ("*NOW*"), which predates most of the long string of federal appellate precedent rejecting *Furgatch*.[16] Even so, *NOW* noted that *Furgatch* was in tension with a Second Circuit opinion, *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980), that "flatly refused" to regulate "implied advocacy." *Id.* at 434. Because the court in *NOW* determined that the speech in question could not be regulated even under *Furgatch*, the court did not have to choose between the Second and Ninth Circuit tests and did not do so. 713 F. Supp. at 434-35.

Thus, the Fifth Circuit's decision below is another in a long line of federal appellate court decisions following the guidance of the Supreme Court in *Buckley* and *MCFL*. Contrary to the Petition's assertion, there is no split among the circuits regarding the express advocacy standard enunciated in *Buckley* and *MCFL*.

III. THE STATE COURTS DO NOT REQUIRE CORRECTION.

Petitioners cite three state court decisions for the proposition that states are departing from the *Buckley/MCFL*

---

[16] Since the Petition was filed, a judge on the federal court for the Southern District of Alabama issued an opinion in which he "parts company" with many of the courts of appeals cited *supra*. *Nat'l Fed'n of Republican Assemblies v. United States*, No. CIV.A.00-0759-RV-C, 2002 WL 2008245, at *16 n.36 (S.D. Ala. Aug. 27, 2002). However, the meaning of express advocacy was not an issue that was before the judge, and, therefore, he did not address it.

standard. As detailed below, those decisions in fact show no such trend. Moreover, the Petition ignores many other state Supreme Court decisions that follow the *Buckley/MCFL* standard. *See, e.g., Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 4 P.3d 808, 821 (Wash. 2000) (following *Buckley*, finding ad protected from regulation, and declaring that *Furgatch*'s approach "is too flexible to be consistent with *Buckley*"); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135, 142 (Ind. 1999) (imposing a narrowing construction on an Indiana statute, following *Buckley*, and construing the statute to reach only expenditures for "communications that in express terms advocate the election or defeat of a clearly identified candidate for office or the victory or defeat of a public question"); *Va. Soc'y For Human Life, Inc. v. Caldwell*, 500 S.E.2d 814, 818 (Va. 1998) (following *Buckley* and narrowing phrase "for the purpose of influencing the outcome of an election" to reach only "groups that expressly advocate the election or defeat of a clearly identified candidate"); *Doe v. Mortham*, 708 So.2d 929, 933 (Fla. 1998) (narrowing statute, expressly per *Buckley*, "to reach only those funds used for communications that expressly advocate the election or defeat of a clearly identified candidate or referendum issue"); and *Connecticut v. Proto*, 526 A.2d 1297, 1311 (Conn. 1987) ("like the court in *Buckley*," narrowing statute "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate").[17]

---

[17] After the Petition was filed, the California Court of Appeal announced its political advertising-related decision in *Governor Gray Davis Committee v. American Taxpayers Alliance*, No. A096658, 2002 WL 31116829 (Cal. App. 1 Dist. Sept. 25, 2002). Relying on *Buckley, MCFL* and consistent courts of appeals decisions, including the Fifth Circuit's decision here, the California Court of Appeal rejected the *Furgatch* standard, noting that "*Furgatch* has not found approval or support in other circuits" and that "the court in *Furgatch* never mentions *MCFL* . . . which was decided prior to issuance of its opinion." *Id.* at *11 n.10, 12. It in-

The Petition's reliance on *Elections Board of Wisconsin v. Wisconsin Manufacturers & Commerce*, 597 N.W.2d 721 (Wisc. 1999), (Pet. at 21) is misplaced. That state court opinion surveyed the express advocacy landscape and explained that *Furgatch* had overlooked *MCFL* by adopting a context-based application of the express advocacy standard. Noting that numerous courts have rejected it, the Supreme Court of Wisconsin refused to adopt the *Furgatch* standard and decided the case on grounds other than express advocacy. 597 N.W.2d at 734-37. The court affirmatively addressed application of the express advocacy standard only by making the undisputed point that this Court in *Buckley* and *MCFL* required the presence of "explicit words of advocacy" which are not exhausted by the eight terms listed in *Buckley*'s footnote 52. *Id.* at 737.

Petitioners' reliance on *Osterberg v. Peca*, 12 S.W.3d 31 (Tex. 2000), *cert. denied*, 530 U.S. 1244 (2000), (Pet. at 21) is also misplaced. In that case, the Texas Supreme Court affirmed rulings that an advertisement constituted express advocacy where it identified an incumbent candidate for judicial office and contained the words "BRING THE COURTHOUSE BACK TO THE PEOPLE" and "VOTE FOR HIS OPPONENT." *Id.* at 35. The court did not rely on *Furgatch* in reaching that decision, but instead relied on *Buckley*, *MCFL*, and the quoted language. The advertisers argued that there was other language in the ad that constituted "contradictory pleas for action" and contended that the language in *Furgatch* ("if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy") should control when the ad contains conflicting messages. 12

---

validated California election law provisions adopting the *Furgatch* standard and determined that the disputed television advertisement merited First Amendment protection because it did "not contain the express or explicit words of advocacy that are subject to regulation." *Id.* at *14.

S.W.3d at 53. Thus, this was an argument that *Furgatch* can be used to negate the presence of words of express advocacy in an ad. First, the "negate express words" theory has no relevance in the present case, because the Chamber's ads contained no words of express advocacy. Second, and more important, the Texas Supreme Court rejected that *Furgatch*-based argument, and relied instead on that part of *MCFL* finding that contradictory language in the brochure "'cannot negate' the fact that the communication's essential nature was express advocacy." *Id.* at 53 (quoting *MCFL*, 479 U.S. at 249). Thus, the Texas Supreme Court has not rejected the standard reading of *Buckley* and *MCFL*.

Finally, the Petition cites *State ex rel. Crumpton v. Keisling*, 982 P.2d 3 (Or. Ct. App. 1999), in which an intermediate state appellate court adopted *Furgatch*. (Pet. at 21). The *Crumpton* case involved construction of an Oregon disclosure statute. The Oregon Court of Appeals opined that "when a statute that affects speech does not have criminal consequences, the constitutional requirements appear to be significantly less," 928 P.2d at 9, and distinguished *Buckley* because the statute considered there had criminal penalties. It then concluded that, "whether or not the Ninth Circuit's approach in *Furgatch* is correct as to the federal Act with its threat of criminal punishment, it provides a proper foundation for construing the expenditure reporting requirements of ORS 260.044(1), with their limited civil sanctions." *Id.* at 10. If *Crumpton* is wrongly decided, the Oregon Supreme Court no doubt will correct it, but even if valid as a matter of constitutional law, *Crumpton* would have no relevance here, because the subject Mississippi reporting statute does have criminal penalties (Pet. App. at 23a-24a).

Thus, there is no significant disagreement emanating from state supreme courts. Review by this Court is not needed to resolve any such division or to ensure uniformity in decisionmaking.

IV. EVEN IF THE COURT WERE INCLINED TO ADOPT A NEW STANDARD, THIS CASE PRESENTS A POOR VEHICLE FOR SUCH AN UNDERTAKING.

A. These Petitioners offer a hopelessly broad, subjective and ambiguous alternative standard.

Even if this Court were inclined to reconsider or refine the express advocacy test, this case would not present a good vehicle for doing so. The Petitioners advocate a broad, subjective and ambiguous alternative standard that is wholly at odds with *Buckley*'s objective that political speakers not be held at the mercy of their listeners' understanding.

Petitioners' seek to modify the express advocacy standard so that the government could regulate an advertisement utilizing factors other than whether the advertisement contains explicit terms advocating specific electoral action. The alternative criteria Petitioners espouse are that the ads are "election eve television ads," "feature only a specific candidate" and "tout his or her qualifications," "contain a campaign-like slogan," and are "virtual clones of the candidates' own ads." (Pet. at 10).[18] All of these criteria are ambiguous and not intended by Petitioners to be read literally. Thus, an "election eve" ad is not just one run the evening before election day. For example the lower court ruled on November 2, 2000, five days before the election, and referred to broadcasts that had occurred weeks before ruling. (Pet. App. at 19a, 23a). Thus, Petitioners actually have in mind some unspecified timeframe preceding an election, whose dimensions presumably would be determined through hindsight.

---

[18] Such standards are repeated throughout the Petition: "election eve" (Pet. at 10, 12, 20, 21), "tout" qualifications (Pet. at 7, 10, 17, 20), "campaign-like slogan" (Pet. at 7, 10, 18, 19, 20), and "virtual clone" (Pet. at 8, 10, 13, 17, 20).

The court of appeals found that the ads "described in general terms the candidates' judicial philosophy, background, qualifications, and other positive qualities." (Pet. App. at 2a).[19] Petitioners assert that such ads "tout his or her qualifications." When speech stops merely "describing" and begins "touting" is a subjective matter that would vary from viewer to viewer.

To categorize as express advocacy ads that "contain a campaign-like slogan" likewise would require subjective viewer judgments. "Campaign-like" in whose view? Below the Petitioners argued that one such campaign-like slogan was, "Lenore Prather—A fair and independent voice for Mississippi," which Petitioners contended was equivalent to the *Buckley* example, "Smith for Congress." The Fifth Circuit rejected that logic, noting that the ad "connects a name to a positive character trait," while "Smith for Congress" connects "a name with an elected office." (Pet. App. at 16a). The court of appeals found that the ad language was "ambiguous." (Pet. App. at 16a). Petitioners do not explain how political speakers can be sure in advance whether some viewers might construe any catchy phrase to be a "campaign-like slogan."

Similarly, the proposed "virtual clone of the candidates' own ads" standard is ambiguous and dependent on viewer perception. It is unclear what "virtual clone" may mean.[20]

---

[19] The district court said that they "comment on the backgrounds and qualifications of four candidates." (Pet. App. at 23a).

[20] Under federal law, expenses incurred by third-parties to reproduce and disseminate a candidate's campaign materials are treated as contributions to the candidate. 11 C.F.R. § 109.1(d)(1). Petitioners have not alleged that the Chamber's advertisements constitute such candidate contributions. (Pet. App. at 23a). Nor could they. Notably, neither the district court, nor Petitioners include a transcript of the candidates' ads in their analyses. The fact of the matter is that the candidates' ads and the Chamber's ads have conspicuous differences. Moreover, the Chamber's

Petitioners seem to propose a standard that depends on perceived similarities between the video and audio content of two ads. Such perceived similarities, of course, will vary with the eye of the beholder.[21]

All of Petitioners' proposed criteria would tend to place the political speaker "at the mercy of the varied understanding of his hearers," precisely what the *Buckley* standard sought to avoid. 424 U.S. at 43. Moreover, Petitioners offer no meaningful reason why the Court should adopt such viewer-oriented, subjective standards and impose on political speakers the chilling effects that such standards would produce. Petitioners note only that certain commentators perceive "a dramatic increase in expenditures for purported 'issue ads' from the 1996 election cycle to the 2000 election cycle" (Pet. at 13) and that such growth "has over the past several years become an increasingly important topic for academic discussion and debate in law journals and reviews"[22] (Pet. at

---

ads were undertaken independent of any candidate. (Pet. App. at 20a-21a).

[21] Such a viewer impression is reflected in the district court's analysis (Pet. App. at 43a):

> Further, these advertisements are virtually the same as the advertisements being aired by the candidates themselves. The advertisements repeat the touted candidates' names in the very same manner as the candidates own advertisements which exhort the viewing public to vote for the named candidates. In this court's view, a finding of any use of the "magic words" becomes unnecessary when an advertisement clearly champions the election of a particular candidate as the person who will use common sense, ensure prompt adjudication of death penalty cases and uphold victim's rights.

This gives no hint of the court's criteria for measuring sameness other than that the Chamber's "advertisements repeat the touted candidates' names in the very same manner as the candidates own advertisements."

[22] The articles Petitioners cite are not unbiased treatments of the subject, but instead propose methods for circumventing the express advocacy test and opening up political speech to a myriad of regulatory

14-15). Those facts, even if undisputed, show only that there is much political speech and academics are writing about it. The mere fact that speech is widely exercised surely provides no mandate for suppressing rights by narrowing First Amendment protections. Even if there were a proven mandate, the solution would not lie in a broad, subjective and ambiguous standard such as advocated by these Petitioners.

B. A new constitutional standard adopted by this Court would not alter Mississippi's statute, which embodies the *Buckley* express advocacy standard.

Even if this Court were inclined to replace the express advocacy standard with another constitutional standard, such a change would not affect the outcome here. The Mississippi statute was enacted after *Buckley*, but before *MCFL*, and it

---

schemes. *See e.g.*, Richard E. Levy, *Defining Express Advocacy for Purposes of Campaign Finance Reporting and Disclosure Laws*, 8 Kan. J.L. & Pub. Pol'y 90 (1999) (arguing that *Buckley* and *MCFL* did not make express advocacy a constitutional requirement but were only providing a statutory interpretation of federal law and minimizing the dangers from nonprofit, noncommercial entities, respectively); Anthony Corrado, *On the Issue of Issue Advocacy: A Comment*, 85 Va. L. Rev. 1803, 1809 (1999) ("[T]he Court in *Buckley* did not argue that disclosure provisions could only be applied to express candidate advocacy. . . . It did not say . . . that the express advocacy test was the only way to ensure that a disclosure requirement is narrowly tailored."); Glenn J. Moramarco, *Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering*, 49 Cath. U. L. Rev. 107, 126 (1999) ("Since intent is the crucial factor that differentiates electioneering speech from true issue advocacy, a statutory definition of 'electioneering speech' that is based on objective, measurable factors, will never achieve a perfect fit, capturing all and only speech that is intended to influence a vote."); Scott E. Thomas & Jeffrey H. Bowman, *Is Soft Money Here to Stay Under the "Magic Words" Doctrine?*, 10 Stan. L. & Pol'y Rev. 33, 35 (1998) ("The requirement that specific phrases or words . . . must be present in order to find express advocacy creates a gaping loophole in the Act.").

adopted the *Buckley* standard.[23] Therefore, even if this Court were to abandon the *Buckley* standard as a constitutional limit, or find that it was weakened by *MCFL*, as Petitioners urge alternatively, Petitioners would still be bound statutorily by the *Buckley* standard until such future time as the Mississippi legislature might see fit to amend the Mississippi statutes to adopt a new, more inclusive standard.

Thus, review of this case would accomplish less in terms of Petitioners' historical and present authority to regulate political speech than Petitioners suggest. Specifically, it could not change the conclusion that the subject 2000 Chamber ads fell outside the scope of the Mississippi election statutes in 2000.

V. THIS CASE WOULD NOT BE A USEFUL COMPANION TO NEXT YEAR'S DIRECT APPEAL OF CONSTITUTIONAL CHALLENGES TO THE NEW FEDERAL CAMPAIGN FINANCE LEGISLATION.

The Petition also contends that the Writ of Certiorari should be granted because "the instant matter is a particularly appropriate companion case" to *McConnell v. FEC*.[24] (Pet. at 15-17). It is unclear whether Petitioners propose that the Court consolidate this case with *McConnell*, or hear the two cases in the same term. Given the difference between the express advocacy issue raised in this case, and the multitude of other, different issues likely to be raised in *McConnell*, neither suggestion justifies granting review of this case.

---

[23] 1986 Miss. Laws 495 (enacted Apr. 16, 1986). The *MCFL* decision was issued on December 15, 1986.

[24] This is the lead case in a proceeding that consolidates eleven separate complaints, many brought by multiple plaintiffs, for disposition by a three-judge panel, in accordance with the BCRA.

The Petition seeks review of the almost three-decades old express advocacy standard as it applies to speech exercised by persons independent of political candidates. The *McConnell* case involves challenges to almost every aspect of the newly enacted BCRA. The BCRA regulates many different political actors and does so by employing a variety of means. For example, the BCRA limits contributions to political parties, restricts the fundraising ability of federal candidates and officeholders, increases contribution limits to political candidates, and restricts corporate and labor union "electioneering communications."[25] The BCRA regulates "electioneering communications" by employing a bright-line standard other than express advocacy. It regulates political speech that "refers" to a candidate based upon its proximity to an election, and not upon whether the speech contains explicit words of advocacy.[26]

The Petition acknowledges that the *McConnell* case "necessarily present[s] a broader array of issues" than raised here. (Pet. at 16). Indeed, the Petition concludes: "On its merits, this case presents a pressing constitutional question that is independent of those in *McConnell* . . . ." (Pet. at 17). These statements belie the Petition's claim (at 16) that "the instant matter is a particularly appropriate companion case" to *McConnell*.

---

[25] *See Bipartisan Campaign Reform Act of 2002*, Election Law News (Wiley Rein & Fielding LLP, Washington, D.C.) Mar. 27, 2002, *available at* http://www.wrf.com/db30/cgi-bin/pubs/ElectionLawNews020327.pdf.

[26] An "electioneering communication" is any broadcast, cable, or satellite communication made within 30 days of a primary or 60 days of a general election, that refers to a clearly identified candidate for federal office, and is targeted to the relevant electorate. BCRA § 201 (to be codified at 2 U.S.C. § 434).

A. This case cannot be consolidated with the *McConnell* case in a manner consistent with this Court's practice.

This Court's practice precludes consolidation of this case with *McConnell* because of the stark differences between the two cases. This Court has consolidated cases in the past only when they raise the same narrow substantive issue. *See, e.g.*, *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994) (consolidation of two cases from the Supreme Court of Hawaii addressing federal preemption under the Railway Labor Act); *United States v. Eichman*, 496 U.S. 310 (1990) (consolidation of cases from the United States District Courts for the Western District of Washington and for the District of Columbia regarding the constitutionality of the Flag Protection Act). The case below and the *McConnell* case are similar only in the broadest of terms; they are both First Amendment cases in the political speech context. As explained by the Petition itself, this case addresses a very specific issue, while the *McConnell* case will necessarily cover a broad array of First Amendment issues that do not include reinterpretation of the express advocacy standard.[27] These cases do not address the same statute or even the same legal theory. Therefore, they cannot properly be consolidated, and the Writ of Certiorari cannot be granted based upon that theory.

B. Judicial economy is not furthered by considering this case with the *McConnell* case.

Instead of requesting consolidation, the Petition may simply be suggesting that judicial economy would be served by granting the Writ of Certiorari and hearing the case in the same term as the *McConnell* case. The Petition contends that "comprehensive treatment of election finance issues in this

---

[27] BCRA § 211 does not amend the meaning of "expressly advocating the election or defeat of a clearly identified candidate" contained in 2 U.S.C. § 431(17).

term should include this case." (Pet. at 16). Petitioners suggest (at 17) that the Chamber's ads underlying this case "may provide a practical, real world context that is beneficial to the Court's consideration" of the *McConnell* issues.

The Chamber has produced numerous ads to the parties defending the BCRA in the *McConnell* actions, as have many other plaintiffs in those actions. Many of those ads will be used as trial exhibits. Issues about the BCRA will be well formulated by interaction of the *McConnell* parties based on the record developed in those proceedings. *McConnell* will be decided on that basis, not on the basis of the record in this case, a record that the *McConnell* parties have not considered.

This case addresses the express advocacy standard, the application of which has been twice explained by this Court in *Buckley* and *MCFL*, and subsequently has been affirmed by every federal court of appeals to address the two cases. The boundaries of express advocacy are settled law. The constitutionality of the BCRA, which regulates beyond express advocacy, is not settled law. Judicial economy in resolving one group of novel issues cannot be advanced by reviewing another issue that is firmly settled.

Petitioners speculate (at 17) that the *McConnell* case may lead this Court to "re-examine the approach of *Buckley* or change the parameters of the various holdings in *Buckley*," and then contend that "this case should have the benefit of the Court's guidance." Petitioners will have the benefit of the Court's guidance in *McConnell*, just like everyone else, by reading the resulting opinion. The fact that these Petitioners are interested in the potential outcome of some other case simply cannot be sufficient justification for certiorari, or else many thousands of petitioners could qualify on that basis each year.

Finally, the Petition incorrectly assumes that consideration of the express advocacy issue, along with the multitude of

other issues raised in the *McConnell* case, will add clarity to that case. (Pet. at 17). As described *supra*, the *McConnell* case will address recently enacted statutory provisions separate and distinct from the express advocacy standard. More than 80 different parties are either supporting or opposing various provisions of the BCRA in the *McConnell* case. Although some of the issues raised by the *McConnell* parties may overlap among themselves, each party brings with it a different perspective to be considered by the Court. Adding the express advocacy issue, and the attendant twenty-seven years worth of jurisprudence, along with an additional group of parties, would needlessly burden what will inevitably be a very large and complicated case. Therefore, even if it were necessary for this Court to review that standard yet again, and it is not, judicial economy could not be advanced by combining this case with the *McConnell* case.

CONCLUSION

For the above-stated reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

MICHAEL B. WALLACE
PHELPS DUNBAR, L.L.P.
200 S. Lamar Street
Suite 500, Skytel Centre
Jackson, MS 39225

Counsel for Petitioner

Of Counsel

STEPHEN A. BOKAT
General Counsel
U.S. Chamber of Commerce
1615 H Street, N.W.
Washington, DC 20062